IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 25, 2009 Session

SPRINTZ-HALL REAL ESTATE PARTNERS, LLC v. ASHLEIGH MARTIN, ET AL.

Appeal from the Circuit Court for Davidson County
No. 05C-2041 Thomas W. Brothers, Judge

No. M2008-02093-COA-R3-CV - Filed September 29, 2009

Sprintz-Hall Real Estate Partners, LLC ("Landlord") sued Ashleigh Martin and R. Martin Enterprises, Inc. ("Tenant")[1] for breach of a lease. Tenant answered the complaint and counter-sued for, among other things, breach of contract, misrepresentation, and fraud. The case was tried before a jury. At the close of proof, the Trial Court granted a directed verdict for Landlord as to certain of the claims including that Tenant had breached the lease. The Trial Court further found that Landlord did not breach the lease. Tenant's claims for negligent misrepresentation and intentional misrepresentation were submitted to the jury. The jury returned a verdict finding, *inter alia*, that Landlord made a misrepresentation that induced Tenant to enter into the lease, that Tenant had ratified the lease, and that Landlord was entitled to a judgment of $44,064 from Tenant. The Trial Court entered judgment on the jury's verdict in favor of Landlord for $44,064 plus pre-judgment interest, attorney's fees, and costs. Landlord requested $153,771.54 in attorney's fees. After a hearing, the Trial Court awarded Landlord $25,000 in attorney's fees and $3,630.96 as expenses for court reporter fees. Tenant appeals raising issues regarding the directed verdict, jury instructions, and the Trial Court's response to a question asked by the jury. Landlord raises an issue regarding the award of attorney's fees. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and JOHN W. MCCLARTY, J., joined.

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[1] Ashleigh Martin is the tenant on the lease. In addition to signing the lease, Ms. Martin also signed a Lease Guaranty in her capacity as Vice President of R. Martin Enterprises, Inc. For the sake of simplicity, we refer to Ms. Martin and R. Martin Enterprises, Inc. collectively in this Opinion as the 'Tenant' with the understanding that R. Martin Enterprises, Inc. was involved in this case as the guarantor of the lease and not as the actual tenant.

Bruce D. Brooke, Memphis, Tennessee for the Appellants, Ashleigh Martin and R. Martin Enterprises, Inc.

John F. Teitenberg, Nashville, Tennessee for the Appellee, Sprintz-Hall Real Estate Partners, LLC.

OPINION

Background

Landlord and Tenant entered into a Lease Agreement (the "Lease") and an accompanying Lease Guaranty in March of 2004, which provided that Tenant was leasing space in a new retail establishment in Nashville known as Spaces in order to operate a ladies shoe store known as Bari Chase. Tenant moved into Spaces and began to operate the shoe store in July of 2004. Approximately seven months later, Tenant moved her merchandise out of Spaces and ceased doing business at that location. Landlord sued Tenant for breach of the Lease. Tenant answered the complaint and counter-sued for, among other things, breach of contract, misrepresentation, and fraud. The case proceeded to trial before a jury.

The Lease, which was introduced into evidence at trial, provides, in pertinent part:

> TERM: Sixty (60) calendar months, commencing on the earlier of (a) the date that is thirty (30) days after Landlord notifies Tenant that the Premises are substantially complete and available to Tenant for Tenant's Work; or (ii) the date on which Tenant shall open the Premises for business to the public (the "Commencement Date"). If the Commencement Date occurs on a date other than the first day of a calendar month, then the period from the Commencement Date to the first day of the next calendar month shall be added to the term of this Lease. In no event shall the Commencement Date occur before the date of first occupancy of the Building by Landlord in accordance with the Underlying Lease.
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> LEASE TERMINATION: Provided Tenant is not in default, Tenant shall have the right to terminate the Lease during the Initial Lease Term which termination notice may be given at any time after the expiration of the first (1st) Lease Year. Tenant must notify Landlord in writing (the "Termination Notice") at least sixty (60) days prior to the effective date of the Termination Notice. If Tenant exercises such right, Tenant must pay Landlord a Termination Fee equal to twelve (12) months Fixed Minimum Rent and Additional Rent at or prior to the effective date of the Termination Notice.
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> * * *

19. DEFAULT. This Lease is made upon the condition that Tenant shall punctually and faithfully perform all of the covenants, conditions and agreements by it to be performed as in this Lease set forth. The following shall each be deemed to be an event of default (each of which is sometimes referred to as a "Default" in this Lease):

(a) Tenant shall fail to pay when due any Rent or other sums due any other party under the terms and provisions of this Lease.

(b) Tenant shall cease to conduct its business activity upon the Premises or abandon the Premises, except as otherwise permitted herein.

* * *

20. REMEDIES FOR DEFAULT. In event of a Default, Landlord at its option may, without further demand or notice, at once, or any time thereafter during continuance of such Default, do one or more of the following:

* * *

(c) If a Default occurs under subsection (b) of the preceding Section, Landlord shall be entitled to collect an amount equal to twenty-five percent (25%) of the Fixed Minimum Rent as liquidated damages in addition to all other sums to which Landlord may be entitled. Landlord and Tenant agree that Landlord's damages for such a Default are not readily ascertainable and that such amount is a reasonable estimate of Landlord's damages and not a penalty.

* * *

(f) No remedy herein or otherwise conferred upon or reserved to Landlord shall be considered exclusive of any other remedy but the same shall be cumulative and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute, and every power and remedy given by this Lease to Landlord may be exercised from time to time and as often as occasion may arise or may be deemed expedient.

* * *

(g) If any Rent is collected by or through an attorney at law or upon advise [sic] therefrom, or if Landlord retains an attorney at law in connection with enforcement by Landlord of any covenant or obligation of Tenant or of any right or remedy of Landlord hereunder, Tenant agrees to pay the reasonable attorney's fees incurred by Landlord.

* * *

35. MISCELLANEOUS.

* * *

(f) This Lease and the exhibits attached hereto set forth all the terms, conditions, provisions and agreements between Landlord and Tenant concerning the Premises, and there are no promises, agreements or undertakings, either oral or written, between the parties concerning the Premises other than as set forth herein. No amendment, modification or addition to this Lease shall be binding upon the parties unless in writing and executed by the parties.

Tammy Sprintz-Hall testified at trial that she is the "co-chief manager, owner of Spaces" along with her husband, Jeffrey Hall. Ms. Sprintz-Hall also is the owner of Escape Day Spa and Salon, which operates at Spaces. Prior to opening Spaces in 2004, Ms. Sprintz-Hall and her husband were in the commercial photography business in Los Angeles and then in Nashville for a number of years. Ms. Sprintz-Hall described the concept of Spaces stating:

> Spaces is a retail concept that my husband and I talked about for years before we actually did it. About the idea of finding a somewhat small building and dividing it into individual boutiques. A place different from the strip center.
>
> Nashville has a lot of big malls. Like, you know, the big, you know, corporate chain malls and then Nashville has a lot of strip centers. So our idea was to find a really great building with great bones. Kind of redesign it and divide it up and rent space out to independent retailers.
>
> You know, it's hard in today's world to be an independent retailer and survive against the big chains. It's just a really hard thing. So we thought that we can open the space where all the independent retail owners could open together and work together as a great team. Advertise together and do things that they couldn't normally afford to do when you're out on your own in a strip center and you're just by yourself.
>
> You know, that will give them a better chance, kind of a fighting chance against, you know, kind of the big corporate that's knocking out the little guy. That's basically our concept. And to make it trendy and hip and something that Nashville, you know, probably hasn't seen before.

Ms. Sprintz-Hall testified that she rents the building that Spaces is in under a lease that has an initial term of ten years and options thereafter for five years apiece for a total term of twenty or twenty-five years. They gutted the entire interior of the building and rebuilt it when she

and her husband took over the building that Spaces occupies. Ms. Sprintz-Hall testified that there were seventeen potential spaces for boutiques at Spaces in the early stages.

Ms. Sprintz-Hall testified that she got Ashleigh Martin's name from another store owner who told her that Ms. Martin owned Bari Chase and might be interested in expanding to Nashville. Ms. Sprintz-Hall called and spoke to Ms. Martin and later visited the Bari Chase store in Memphis. Ms. Sprintz-Hall initially met with Ms. Martin and Ms. Martin's father, Ronald W. Martin, in the fall of 2003. The Martins then visited Nashville to see the Spaces building in late 2003, prior to the start of construction.

Ms. Sprintz-Hall further testified that demolition began on the Spaces building in December of 2003 and construction commenced after the holidays. When asked about the expected opening date for Spaces, Ms. Sprintz-Hall testified "we planned on probably late spring, summer, fall. You know, sometime in that period of time we planned on opening." The construction of Spaces was completed in June of 2004. The tenants were given thirty days to build out their boutique areas after the construction of Spaces was completed. The grand opening of Spaces was the last week of July of 2004.

Ms. Sprintz-Hall testified that other than the one time she visited Bari Chase in Memphis, every time she met with the Martins was at the Spaces building:

> So they could, you know, kind of witness, you know, when electrical was happening. When the ducting for the air conditioning was happening or the floor. We reblasted the floor to get back the concrete. Had a lot of glue on it from carpet and stuff, so we had to reblast the floor. So they kind of saw it. So it was kind of maybe part of the conversation while they were there. Look, the windows are going in and they were there to see it when they came.

Construction was not completed when Ms. Martin signed the lease in March of 2004, and both of the Martins were aware of this fact. Ms. Sprintz-Hall testified that Ms. Martin was one of the first tenants to sign a lease for Spaces.

There were about seven stores in Spaces at the time of the grand opening. When asked what those stores were, Ms. Sprintz-Hall responded:

> There was a women's clothing store, that had mostly European clothes. There was a second women's clothing store that started out to be more business casual and going out kind of casual. It developed and changed overtime. There was an accessory store that sold bath and body and candles and artisan jewelry and pajamas. And a really, really, fun store. And she still sells the same kind of merchandise.
>
> And there was [sic] interior designers that opened a really great interior design showroom. And there was a maternity boutique from Memphis as well.

> There was a baby store that had moved her store from a previous location in Franklin. And she wanted a Nashville location. She closed that store and moved into Spaces. There was a store for pets. It wasn't really a pet babysitting place. It was a - - you bought accessories for your pets. Like pulls and leashes and dog toys and cat toys. I think she had cat toys and fun stuff for your pets. Like people that loved to buy stuff for their animals.

When asked about a merchant's association at Spaces, Ms. Sprintz-Hall answered:

> Yeah, the merchants organized - - were to organize it. I think it says in the lease that something about the formation of a merchants association through the merchants. Which the landlord would participate in. I believe it says some language like that.… Merchant's association - - we had by-laws and we had an attorney that came and scripted the by-laws and when we would meet and so forth. And we would meet, I believe, once a month. And it was mainly for the tenants to get together and kind of talk about where they were going and what they wanted to do.
>
> And to do group advertising, was - - is one of the main reasons. To do group advertising and also to do functions together. Like if we did our holiday open houses and when we did our first opening event.

At some point the Martins indicated they were not willing to participate in group advertising by not paying the bills.

Ms. Sprintz-Hall testified that the termination clause in the Lease was not standard in the leases for Spaces. Mr. Martin insisted in having the termination clause in the Lease.

Ms. Sprintz-Hall testified that on March 1, 2005, Ms. Martin removed the merchandise from Bari Chase and vacated the Spaces' premises. When Ms. Martin vacated Spaces she left behind some things including some rugs, ottomans, and a chandelier. Ms. Sprintz-Hall testified that two days after Ms. Martin moved out of Spaces, she and her husband received a letter by FedEx stating that Ms. Martin was terminating the Lease. Ms. Sprintz-Hall testified that she still was working to find tenants for the other available areas at Spaces. Ms. Martin vacated Spaces shortly after being informed that a restaurant, The Grape, was moving into Spaces. The Grape opened in June of 2005.

According to Ms. Sprintz-Hall, The Grape has changed its name to 360 and the 360 restaurant still was in Spaces at the time of trial. Spaces also had a popsicle and gelato store named Collectos for a few years. Ms. Sprintz-Hall testified that the motto of Spaces is 'eat, shop, relax' and that they put 'eat, shop, relax' on the sign they erected when they started work on the Spaces' building. When asked if she made an attempt to bring a restaurant to Spaces earlier, Ms. Sprintz-Hall testified:

> Yes. The whole - - during the whole planning phases even before construction and during construction, we talked to many restaurants. I mean, I think you've seen the list. You know, Brennen Company, Provence, Baha Fresh, The Yellow Porch, Wild Iris, Camille's Cafe, Sunset Grill, Randy Rayburn, Tin Angle, Rick Balsam. Baha Fresh - - not Baha Fresh, I already said them. They wanted that front corner really, really, bad. But we didn't think it was the right upscale traffic for, you know, the tenants that we had.
>
> Baha Burrito, Troy Smith, The Baha Burrito. We talked to a lot of sandwich places. Oh, we talked to a lot, a lot of restaurants. I have on my calendar where we were meeting four or five different restaurants. The ones that we talked to the longest and the most and did lots of, you know, LLIs and starting of leases were Bread and Company, Provence, Ben & Jerry's, we talked to for a long time. Baha Fresh.… Well, Ben and Jerry's, we went fairly far down the road. I think we - - they had maybe had [sic] gone to lease negotiations with our attorney and our broker. They decided to open on Vanderbilt Campus so they were scared to bite off more than they could chew. And Bread and Company, who we probably negotiated with for maybe nine or ten months and in the term I became fairly friendly with their owner and still on really good terms with the owner.
>
> And we negotiated a long time with them. And they were approached right before we opened by a business across the street called Corner Market and they weren't doing so well. So they approached them to take over their lease. And they already had a built-in kitchen and built-in freezers and kind of enticed them because they were failing. And kind of wanted to get out of the debt that they were in. So Bread and Company ended up opening right across the street.

When asked if she had ever told any tenants that she had a signed lease with a restaurant prior to The Grape signing, Ms. Sprintz-Hall testified:

> Absolutely not. My broker told me until the deal is signed, you don't breath a word of it. Because - - and I experienced this as well, other commercial brokers would take your tenants.
>
> So when someone would come to talk to us, I would keep it very close to the vest. I mean, we're talking to two big tenants right now, or tenants and I wouldn't reveal to anybody who they are because someone could steal them or someone could - - you know, you just don't kind of count your chickens before they hatch. You don't.

When asked if a spa had signed a lease prior to her initial meeting with the Martins, Ms. Sprintz-Hall testified:

> Not at the time we first started talking to them, no. We had been talking to Elan, which is a salon/spa in Green Hills. And they were going to expand and open a second location.
>
> So they were someone that we were negotiating and talking to. And I also used to get my hair done there so I was friendly with the owner. So we talked to him a bunch, Dennis.
>
> And we were talking to a Moment's Peace which is a spa out in Cool Springs.… And the original owners, the ones that we talked to, there's new owners now. But the original owners that we talked to, he was kind of a real business guy and the wife was a hair stylist. So we didn't meet with her much, because she had just had a baby. But we met with him a bunch and he was interested in opening a second location.
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> So we talked to him for awhile and probably did letters of intent with both of them. I think we talked with Dennis at Elan for a long time because we talked about people going upstairs and downstairs. If it would be stairs or elevators.
>
> And we talked to - - we went to Atlanta and there is a spa chain in Atlanta called Spa Cidal. And I think they have eight locations now. Maybe at the time they only had six, but they have eight locations. And I talked to their owner Richard Harris for a while about the idea of moving to Nashville. But as I know now, it's a very hands-on business. You have to be in the same town as the spa you owned. And so he was scared about venturing out of the city he lived in. So I talked to many spas.

Ms. Sprintz-Hall opened Escape Day Spa and Salon in Spaces in October of 2005.

Ms. Sprintz-Hall also testified about a makeup artist from California named Richard Smith. She explained that she met Mr. Smith through Jenny Adair in February or March of 2004 prior to the opening of Spaces. Ms. Adair is the owner of Sugar, a boutique that operated in Spaces for a time. Ms. Sprintz-Hall testified that she then introduced Mr. Smith to the owner of Chiba who hired him as a makeup artist. Ms. Sprintz-Hall further testified that at that time, she was negotiating with the owner of Chiba about moving to Spaces. When asked if she told the Martins that Mr. Smith would be opening a makeup boutique at Spaces, Ms. Sprintz-Hall testified:

> No. I have no idea where they got that. I would have no idea why they would think he could even open a makeup boutique. I do remember introducing them and saying this is a makeup artist from LA.… And, you know, he might work for someone that might eventually open up a makeup store in here. I would love for him to work in Spaces. That's what I used to say to everybody that I introduced them to. Cause I thought - - I first thought maybe Jenny will hire him, Jenny's his friend. I just wanted

him around Spaces. He was so much fun and he was one of those people that when a woman walked in the door he could sell them anything.

You know, he was just so fun and personable, that I really wanted that type of person to be in Spaces.

When asked what tenants were in Spaces as of the time of trial, Ms. Sprintz-Hall testified:

A Natural Jewel.… Baylor Bone, Indulge, MJ Shoes, Seam, Vera Runway, Escape Day Spa and Salon and 360.… And until last week The Cellar, which was 360's wine boutique that they - - their business is doing so well, they wanted to expand and the wine store is right next door to them, so they couldn't expand. So they took over their own wine store.

She further testified:

Spaces concept is a success. I think Spaces concept is a success. Have businesses failed there, absolutely. Have businesses failed in any retail centers? Absolutely. Businesses fail, especially small businesses. Especially businesses with absentee owners that, you know, don't participate in their business as much as they should.

When asked if any of the tenants had complained to her that she was in breach of the lease, Ms. Sprintz-Hall testified:

No, ma'am. These were all fairly friendly conversations where we might be out to lunch or talking about it. And them saying, you know, what's the progress? And we would say, well, you know, we talked to Prevance again today or whoever we might be talking to at the time.

Ms. Sprintz-Hall testified that in 2004 she intended to have both a restaurant and a spa at Spaces and was negotiating with prospective tenants at that time.

Lisa Fortessa Hayes, the owner of Haute Momma Maternity, is a former tenant at Spaces. Ms. Hayes testified that Spaces:

looks like a correctional facility. It spent the first year with nothing in that front window but some Sheetrock and some Sheetrock dust all over the floor. And nothing and looking like you expected guys with hard hats to tell you you're not allowed in here when you walk up to the front door.

Ms. Hayes began talking with Landlord in the fall of 2003. She testified:

> We - - specifically we were told - - in my conversations with Tammy, I was told there would be boutiques. She had a children [sic] store. She gave me the name of the children [sic] store. And I wound up getting in touch with the person who owned the children [sic] store. We talked back and forth a lot before the mall ever opened.
>
> I was told a makeup store that was so great, but it was so secret and nobody could be told yet. A lingerie store, I'm sorry, that was great but was a secret and nobody could be told yet. And a restaurant, they had leases out to a couple of different restaurants and they were expected to sign.
>
> And ten days sticks in my mind. I don't know exactly when that was, what month that was in the fall, but ten days they expected a contract on one of the restaurants.
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> The reason for the lingerie place, the makeup place, they had not made their grand announcement to everybody that they were opening a store there. So nothing was allowed to be said as to who it was until the company was allowed to make there [sic] announcement.
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> So we were all going, oh, my gosh, is it Sephora, who's it going to be. Being very excited and very just psyched about this cool place and feeling privileged to be on the ground floor of what we were expecting to be the fantastic place that everybody was clamoring to get into. And there just wasn't enough space for everybody who wanted to be in there.

According to Ms. Hayes, Tammy Sprintz-Hall told her:

> The larger space [pictured on the exhibit] was going to be fine dining and the other smaller space was going to be a little casual cafe, not a popcicle [sic] place. But kind of a form of casual - - you could get things that you could kind of walk around with, that type of thing. But you could also sit in there type of cafe. The larger space was going to be fine dining.

Ms. Hayes testified that Spaces opened in July of 2004 and that there were six stores that opened at that time. There was no restaurant and no day spa in Spaces when it opened. Ms. Hayes moved out of Spaces about a year after Ms. Martin moved out. Ms. Hayes admitted that Landlord filed a lawsuit against her and that Landlord obtained a judgment against her.

Ashleigh Martin Goode[2] testified that she worked at Nine West and Banana Republic as a sales associate for approximately a year or a year and a half while she was in high school. After high school, she went to college for two and a half years, but did not complete a degree. Then Ms. Martin moved back home and got a job at the Bari Chase store in Memphis in 2001. At that time, Bari Chase was owned by a woman named Bari Gardner. In December of 2002, R. Martin Enterprises purchased the Bari Chase store.

When asked if any provision in the Lease obligates the Landlord to provide a restaurant tenant, Ms. Martin testified: "I do not believe so." She further admitted that the Lease also does not obligate the Landlord to provide a day spa and makeup boutique. When asked, Ms. Martin agreed that there is no specified date in the Lease directing when Landlord had to turn over the property to Tenant.

Ms. Martin admitted that when they opened the Nashville store in Spaces, Bari Chase did not have an established name in Nashville, did not have an established customer base, had no existing marketing in place, and, further, that she was not as familiar with the Nashville market as she was with the Memphis one. When asked if she hired any experts to do marketing surveys before she signed the Lease, Ms. Martin testified: "I believe we were doing demographics by Tammy and Jeff. I remember being told there was, you know, like three country clubs within a five mile radius of Spaces and income of the area of Spaces. And the high end store McClure's store [sic], and how well it had done." Ms. Martin admitted that she did no independent research into the area. When asked what her advertising budget was when she signed the Lease, Ms. Martin testified: "We believe very firmly in advertising. I don't believe we had a budget." Ms. Martin admitted that she was not in the Spaces Bari Chase store every day.

Ms. Martin testified that after she left Spaces, the Bari Chase Memphis store:

> closed down a single location in a strip mall to move into a large, as Tammy was referring to earlier, a Bendel's, meaning a small department store but not being a boutique department store. To be in there as a lease department to be surrounded by clothes and have the one stop shop that we were trying to achieve here.

The store in Memphis is no longer called Bari Chase, but is called Ladies Shoe Salon at Oak Hall. Ms. Martin admitted that the selling floor in Ladies Shoe Salon at Oak Hall is about 300 square feet less than the selling space of the old Bari Chase Memphis store.

Ms. Martin admitted that she ordered merchandise for the Spaces Bari Chase store before signing the Lease. Ms. Martin witnessed the construction at Spaces and was there once or

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[2] Ms. Martin married since she signed the Lease. When asked how she would prefer to be addressed at trial, Ms. Martin stated that she could be referred to as 'Ms. Martin.' As the Lease was signed in the name of Martin and the lawsuit was filed in the name of Martin, we refer to Ms. Martin throughout this Opinion as Ms. Martin rather than Ms. Goode.

twice a week during that time. She admitted that she knew on the day she signed the Lease what condition Spaces was in with regard to construction. She testified: "we assumed everybody was moving in at the same time. So yeah, I assumed there was going to be a restaurant based on starting construction at any point in time. We all ran up there to do our build out." Ms. Martin admitted that when she did her build out for the Spaces Bari Chase, she did not see anyone building out for a restaurant.

Ms. Martin admitted she has no evidence that Ms. Sprintz-Hall lied about negotiating with Bread and Company or any other restaurants prior to the time Ms. Martin signed the lease. She further agreed that Landlord had intentions to attract a restaurant tenant to Spaces. Ms. Martin admitted she never was told that a lease had been signed for a day spa and that she has no evidence that Landlord was not negotiating with investors regarding a day spa. Ms. Martin further admitted that she has no evidence that Landlord did not intend to have a day spa. Ms. Martin admitted that Landlord never told her a lease had been signed for a makeup boutique and that she has no evidence that Landlord did not intend to have a makeup boutique. Ms. Martin testified: "I was told that [Richard Smith] would be occupying the space next door to me. Yes, I did assume there was a lease signed." Ms. Martin also admitted that Landlord did not make any misrepresentations about a florist being in Spaces. Ms. Martin disputed Ms. Sprintz-Hall's assertion that an attorney organized a tenant's association or that such an association adopted bylaws.

Ronald W. Martin is Ashleigh Martin's father. He testified that years earlier he was in the printing business and bought a company, which he eventually incorporated as R. Martin Enterprises. Prior to purchasing Bari Chase, Mr. Martin had no experience in the retail shoe business. Mr. Martin testified that he purchased Bari Chase in Memphis for $135,000. After he purchased the store, Ms. Bari Gardner, the original owner, still was involved as a consultant to the business. Mr. Martin testified that the Bari Chase Memphis store did not meet its sales target in 2003, but that they still decided to expand Bari Chase to Nashville.

Mr. Martin did not consult an attorney when negotiating the Lease. He also did not consult any marketing experts before signing the Lease. Mr. Martin testified that when he purchased the Bari Chase Memphis store, Ms. Martin was 23 years old.

When asked about the termination provision he negotiated in the Lease, Mr. Martin testified:

> Yeah. I was concerned with a start up business and the Spaces concept. I was concerned with any start up business, when you start up. But with the concept they presented and what we were told, it sounded, as my past business experience tells me, you know, if it sounds too good to be true, it probably is not true. And in this case, it found to be that way for us.
>
> It wasn't as good as it was told it was going to be. And so just as a precaution, the only thing I felt like I needed to work on is that we go up there and

> things don't work out, we're not in a five-year lease. We can pack our bags and go home after two years. And in this case, we didn't survive two years.… I didn't think it would not make it. I wouldn't have even signed it if I thought it wasn't going to make it. That was just a precautionary thing that I just decided that if they don't agree to a two year instead of a five, let's go with two, we can always get an option to go with five on two. So it was not, to me, if they agreed to it, it was just better for us.

Mr. Martin admitted that Ms. Martin was not in compliance with the termination provision of the Lease and stated:

> Yeah. I made a decision after we had been told things - - were not true things, things that did not happen, that I could not trust these people, that I could not live with the way they lied to us any longer, that any business could survive, and we weren't going to be around it any longer. So then I decided to move out in February of '05.

Mr. Martin admitted that he saw "week to week" the construction work being done at Spaces prior to Ms. Martin signing the Lease. He also agreed that nothing in the Lease obligates the Landlord to provide signs or advertising for the tenant. Mr. Martin also admitted that there is nothing in the Lease that obligates the Landlord to provide anchor tenants, and admitted that he never was told that a lease was signed for a restaurant. Mr. Martin testified that he was told:

> we have five restaurants, and it's a matter of us picking which one, and we don't have to worry about - - we're going to have a restaurant, you don't have to worry. We are going to have one, we've got five to pick from. It's the matter of picking which one. That's what I was told.

Mr. Martin admitted that he has no evidence that Landlord was not negotiating with restaurants or that Landlord did not intend to sign a restaurant tenant or a spa tenant. Mr. Martin also admitted that he has no evidence that Landlord did not intend to sign a makeup boutique tenant.

Mr. Martin admitted that he refused to participate in some of the advertising that the Spaces tenants were doing. He testified:

> Yeah. I, you know, that's - - that was penny[-]ante type advertising then, and it is today. And obviously it didn't work. But the marketing plan they had, I totally disagreed with.
>
> And we supported some of it, but when we didn't support it, believe me, it was broadcast throughout that I was the big, bad bear down in Memphis that wouldn't let Ashley [sic] do something. And, you know, it was ridiculous. I felt like a kid up there talking to a bunch of kids up there is what I felt like.

Mr. Martin agreed that he testified during his pre-trial deposition that success in the retail shoe industry is highly dependent on the personal skills of the store manager and that the manager needs to be there to have a personal one-on-one relationship with customers. Mr. Martin admitted that one reason they shut down the Bari Chase Memphis store is because it was not profitable.

At the close of proof, both Landlord and Tenant moved for directed verdict as to certain of the claims. The Trial Court granted Landlord's motion holding, *inter alia*, that Tenant had breached the Lease, that Landlord had not breached the Lease, and that Tenant had entered into a valid guaranty agreement and was liable for any and all damages caused by Tenant's breach. The Trial Court also granted Landlord a directed verdict on Tenant's claims for frustration of commercial purpose and negligence. The Trial Court denied Landlord's motion on Tenant's claims for negligent misrepresentation and intentional misrepresentation and these claims were submitted to the jury. The Trial Court denied Tenant's motion for directed verdict.

The jury returned a verdict finding, *inter alia*, that Landlord made a misrepresentation that induced Tenant to enter into the Lease, that Tenant later ratified the lease, and that Landlord was entitled to a judgment of $44,064 from Tenant. The Trial Court entered judgment on the jury's verdict in favor of Landlord for $44,064 plus pre-judgment interest, attorney's fees, and costs. Landlord requested $153,771.54 in attorney's fees. After a hearing, the Trial Court awarded Landlord $25,000 in attorney's fees and $3,630.96 as expenses for court reporter fees.

Tenant filed a Motion for Judgment Notwithstanding the Verdict, Motion to Alter and Amend Judgment, and/or In the Alternative, Motion for New Trial, which the Trial Court denied. Tenant and Landlord appeal to this Court.

Discussion

Although not stated exactly as such, Tenant raises four issues on appeal: 1) whether the Trial Court erred in instructing the jury on ratification; 2) whether the Trial Court erred in granting Landlord's motion for directed verdict, and denying Tenant's motion for directed verdict on the issue of breach; 3) whether the Trial Court erred in its response to the question posed by the jury; and, 4) whether the Trial Court erred in refusing to instruct the jury on habit and routine practice. Landlord raises an issue regarding the award of attorney's fees. Landlord also requests an award of attorney's fees and costs on appeal.

We first consider whether the Trial Court erred in instructing the jury on ratification. "[T]he determination of proper instructions to the jury is a question of law to be determined from the theories of the parties, the evidence in the record and the law applicable thereto." *Solomon v. First Am. Nat'l Bank of Nashville*, 774 S.W.2d 935, 940 (Tenn. Ct. App. 1989). A trial court's conclusions of law are subject to a *de novo* review with no presumption of correctness. *S. Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

In her brief on appeal, Tenant alleges that Landlord "failed to plead ratification as an affirmative defense," and that after the Trial Court directed a verdict for Landlord, the instruction regarding ratification "was only going to result in an automatic favorable verdict for [Landlord]." In its answer to the Tenant's counter-claim, Landlord specifically pled waiver, estoppel and laches. However, Landlord also submitted proposed jury instructions at the beginning of trial that included the instruction on ratification. The Trial Court and the attorneys discussed the issue of ratification during the first day of trial when the Trial Court heard argument regarding the testimony of Ms. Hayes. In addition, a careful and thorough review of the record on appeal reveals that the issue of ratification was tried and that Tenant presented proof and argument in an attempt to rebut this theory. Given all this, we find that Tenant had notice that Landlord was attempting to prove ratification, and further find that this issue was tried to the jury. Under the facts and circumstances of this case, we find no error in the Trial Court's instructing the jury on ratification.

Next we consider whether the Trial Court erred in granting Landlord's motion for directed verdict as to certain of the claims, and in denying Tenant's motion for directed verdict on the issue of breach. Our Supreme Court discussed the standard under which an appellate court must review a motion for a directed verdict in *Johnson v. Tennessee Farmers Mut. Ins. Co.*, stating:

> In reviewing the trial court's decision to deny a motion for a directed verdict, an appellate court must take the strongest legitimate view of the evidence in favor of the non-moving party, construing all evidence in that party's favor and disregarding all countervailing evidence. *Gaston v. Tenn. Farmers Mut. Ins. Co.*, 120 S.W.3d 815, 819 (Tenn. 2003). A motion for a directed verdict should not be granted unless reasonable minds could reach only one conclusion from the evidence. *Id*. The standard of review applicable to a motion for a directed verdict does not permit an appellate court to weigh the evidence. *Cecil v. Hardin*, 575 S.W.2d 268, 270 (Tenn. 1978). Moreover, in reviewing the trial court's denial of a motion for a directed verdict, an appellate court must not evaluate the credibility of witnesses. *Benson v. Tenn. Valley Elec. Coop.*, 868 S.W.2d 630, 638-39 (Tenn. Ct. App. 1993). Accordingly, if material evidence is in dispute or doubt exists as to the conclusions to be drawn from that evidence, the motion must be denied. *Hurley v. Tenn. Farmers Mut. Ins. Co.*, 922 S.W.2d 887, 891 (Tenn. Ct. App. 1995).

Johnson v. Tennessee Farmers Mut. Ins. Co., 205 S.W.3d 365, 370 (Tenn. 2006).

The Trial Court granted a directed verdict for Landlord holding that Tenant had breached the lease. The evidence shows, and Ms. Martin admitted, that she vacated the Spaces premises and ceased doing business at that location after approximately seven months, a clear violation of the Lease. Viewing the evidence in favor of Tenant, construing all evidence in Tenant's favor, and disregarding all countervailing evidence, as we must, we find, as did the Trial Court, that reasonable minds could reach only the conclusion that Tenant breached the Lease. Therefore, the Trial Court did not err in granting Landlord's motion for directed verdict.

As for Tenant's motion for directed verdict, at the close of proof Tenant moved for a directed verdict on the grounds that Landlord breached the provision in the Lease regarding the time for moving in, that Landlord failed to show any efforts to re-rent the premises vacated by Tenant to mitigate damages, and that Mr. Hall testified that tenants would be given a discount on the first month's rent and then inconsistently testified that Tenant was charged full rent as of August 1st. The specific provision in the Lease to which Tenant refers with regard to a moving in date states:

> Within sixty days after the date of execution of this Lease, Landlord will deliver to Tenant Landlord's plans and specifications for the improvements to Premises (the "Landlord Plans") as prepared by Landlord's architect, which shall be limited in scope to the work described in paragraph 3 of this section as "Landlord's Work".

Contrary to Tenant's assertion, this provision in the Lease has nothing to do with a 'moving in' date. Rather, it requires that Landlord provide Tenant with plans and specifications and Tenant makes no assertion that Landlord did not provide these plans and specifications. The Lease also provides, in pertinent part:

> TERM: Sixty (60) calendar months, commencing on the earlier of (a) the date that is thirty (30) days after Landlord notifies Tenant that the Premises are substantially complete and available to Tenant for Tenant's Work; or (ii) the date on which Tenant shall open the Premises for business to the public (the "Commencement Date"). If the Commencement Date occurs on a date other than the first day of a calendar month, then the period from the Commencement Date to the first day of the next calendar month shall be added to the term of this Lease. In no event shall the Commencement Date occur before the date of first occupancy of the Building by Landlord in accordance with the Underlying Lease.
>
> * * *
>
> (k) The parties hereby acknowledge that the Building is not yet open for business and that certain contingencies ("Contingencies") must be met in order for Landlord to proceed with improvements to the Building that are required by the Underlying Lease.…

Tenant provided no evidence that Landlord failed to comply with the above quoted provisions of the Lease. Furthermore, the evidence in the record on appeal shows that Ms. Martin admitted that there is no specified date in the Lease directing when Landlord had to turn over the property to Tenant. As for the alleged failure to mitigate and the allegedly inconsistent testimony given by Mr. Hall, neither of these allegations, even if proven, show a breach of the Lease by Landlord.

In her brief on appeal, Tenant apparently claims that Landlord was in breach for failing to provide specific anchor tenants, signs, and advertising. However, both Ms. Martin and Mr. Martin admitted that the Lease did not obligate the Landlord to provide these things. A careful and

thorough review of the record on appeal reveals that Tenant was unable to point to any provision within the Lease that Landlord breached. Viewing the evidence in favor of Landlord, construing all evidence in Landlord's favor, and disregarding all countervailing evidence, as we must, we find that reasonable minds could reach only the conclusion that Landlord did not breach the Lease. As such, the Trial Court did not err in denying Tenant's motion for directed verdict, and further did not err in granting Landlord's motion by finding that Landlord did not breach the Lease.

We next consider whether the Trial Court erred in its response to the question asked by the jury. During deliberations, the jury asked the Trial Court if the jury had the ability to award offsetting damages amounts resulting in a net of zero dollars for both parties. After discussing the question with the attorneys, the Trial Court called the jury into the courtroom and gave them the following answer to their question:

> In answer to your question, no, you may not award offsetting damage amounts to each party. Only one party may be successful in recovering a judgment. It is your exclusive duty to decide what amount of damages, if any, have been proven by the successful party. Now, I'm going to give you this one copy of the written instruction I just read to you. You may consider that. I don't have copies for all of you, but I think it's simple enough to have one. You can pass it around. I hope that helps you in your deliberations. If you have any other questions, obviously you can submit those. Okay. Thank you.

We find that the actual instructions given to the jury when taken as a whole were sufficient to define the relevant legal issues including the amount of damages. After the Trial Court's decision on the parties' motions for directed verdicts, the issues left for the jury were limited as shown by the verdict form itself. If the jury found no misrepresentation by Landlord, only Landlord could have been awarded any damages. If the jury found a misrepresentation by the Landlord but then a ratification by Tenant, again only Landlord could have been awarded any damages by the jury. If, however, the jury found a misrepresentation by Landlord and no later ratification by Tenant, only Tenant could have been awarded any damages by the jury. Under the verdict form, there was no way Landlord and Tenant both could have been entitled to damages. This was exactly the Trial Court's response to the jury's question. The Trial Court through its instructions and its response to the jury's question made it clear to the jury that it was their job to determine the amount of damages, an amount which might be zero, to be awarded the successful party. The jury was not mislead by the instructions and the Trial Court's response to the jury's question. This issue is without merit.

Next we consider whether the Trial Court erred in refusing to instruct the jury on habit and routine practice. "[T]he determination of proper instructions to the jury is a question of law to be determined from the theories of the parties, the evidence in the record and the law applicable thereto." *Solomon*, 774 S.W.2d at 940. A trial court's conclusions of law are subject to a *de novo* review with no presumption of correctness. *S. Constructors, Inc.*, 58 S.W.3d at 710.

In her brief on appeal, Tenant asserts that "Rule 406 of the Tennessee Rules of Evidence allows the admissibility of evidence as to a person's habit or routine practice of an organization, whether corroborated or not, if it is relevant to prove the conduct of the person was in conformity of the habit or routine practice."

Rule 406 of Tenn. R. Evid. specifically provides:

> **Rule 406. Habit; routine practice. –** (a) Evidence of the habit of a person, an animal, or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eye-witnesses, is relevant to prove that the conduct of the person, animal, or organization on a particular occasion was in conformity with the habit or routine practice.
>
> (b) A habit is a regular response to a repeated specific situation. A routine practice is a regular course of conduct of an organization.

Tenn. R. Evid. 406.

Tenant does not claim that she was prevented from putting on any evidence with regard to habit or routine practice. Rather, Tenant apparently asserts that she is entitled to a jury instruction by virtue of the language contained in Tenn. R. Evid. 406. Tenant has made no showing as to why she would be entitled to this 'special' jury instruction she requested, and the record does not support her assertion with regard to this issue. Tenant argues that it was a habit or routine practice of Landlord to make misrepresentations. In fact, the jury found Landlord had made misrepresentations. However, a careful and thorough review of the record on appeal reveals that Tenant did not show that Landlord made these misrepresentations with any kind of routine regularity, such as every Tuesday, or in response to any specific stimuli, such as stamping the date on each piece of mail as it is opened. We cannot say that the evidence presented to the jury on this issue is sufficient for us to hold that the Trial Court committed reversible error in refusing to give the requested instruction. Simply put, Landlord's allegedly making numerous misrepresentations is not a "habit" or " routine practice" as defined by Tenn. R. Evid. 406 itself. We find no reversible error in the Trial Court's refusal to instruct the jury on habit and routine practice.

Finally, we address Landlord's issue regarding the amount of attorney's fees awarded. "The Trial Court is vested with wide discretion in matters of the allowance of attorney's fees, and this Court will not interfere except upon a showing of an abuse of that discretion." *Threadgill v. Threadgill*, 740 S.W.2d 419, 426 (Tenn. Ct. App. 1987). Our Supreme Court discussed the abuse of discretion standard in *Eldridge v. Eldridge*, stating:

> Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to [the] propriety of the decision made." A trial court abuses its discretion only when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice

to the party complaining." The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court.

Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn. 2001) (citations omitted).

With regard to attorney's fees, this Court stated in *Albright v. Mercer*:

> The Tennessee Supreme Court addressed a similar issue in *Wilson Management Co. v. Star Distribs. Co.*, 745 S.W.2d 870 (Tenn. 1988). The court held:
>
> > [W]here an attorney's fee is based upon a contractual agreement expressly providing for a reasonable fee, the award must be based upon the guidelines by which a reasonable fee is determined. The parties are entitled to have their contract enforced according to its express terms. Where they specify a reasonable fee rather than a percentage of recovery, it is clear that they expect a court to adjudicate the issue of a reasonable fee, unless they agree upon the amount after a controversy matures.
>
> *Wilson*, 745 S.W.2d at 873 (Fones, J.) (citations omitted). Later, the court explained the holding in *Wilson* and stated: "This Court held that where a 'reasonable' fee is called for, the award *must* be based on the guidelines by which a reasonable fee is determined, and not simply a percentage of recovery." *Nutritional Support Servs., Ltd. v. Taylor*, 803 S.W.2d 213, 216 (Tenn. 1991) (Fones, J.).

Albright v. Mercer, 945 S.W.2d 749, 750 (Tenn. Ct. App. 1996).

The Rules of Professional Conduct contains the following list of guidelines for a court to use to determine whether a fee is reasonable:

> (a) A lawyer's fee and charges for expenses shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) The fee customarily charged in the locality for similar legal services;
> (4) The amount involved and the results obtained;
> (5) The time limitations imposed by the client or by the circumstances;
> (6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services;
(8) Whether the fee is fixed or contingent;
(9) Prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
(10) Whether the fee agreement is in writing.

Tenn. Sup. Ct. R. 8, RPC 1.5.

Landlord is entitled to recover attorney's fees in this case by virtue of the Lease and its accompanying Lease Guaranty. The Lease provides: "if Landlord retains an attorney at law in connection with enforcement by Landlord of any covenant or obligation of Tenant or of any right or remedy of Landlord hereunder, Tenant agrees to pay the reasonable attorney's fees incurred by Landlord." Thus, Landlord and Tenant clearly expected a court to adjudicate the issue of a reasonable fee. Both Landlord and Tenant provided proof to the Trial Court concerning the amount of attorney's fees that would be appropriate in this situation. Not surprisingly, there was a wide range between the amount suggested by Tenant and the amount suggested by Landlord. The amount awarded by the Trial Court was within this range.

In this case, the Trial Court carefully considered the factors contained in Tenn. Sup. Ct. R. 8, RPC 1.5 in determining a reasonable attorney's fee. Although reasonable minds could disagree as to the propriety of the Trial Court's decision, the very essence of a discretionary decision, we cannot say, given the evidence presented to the Trial Court on this issue, that the amount of attorney's fees awarded by the Trial Court was not reasonable. Given this, we will not substitute our judgment for that of the Trial Court.

Landlord is entitled to an award of reasonable attorney's fees and costs on appeal by virtue of the Lease and the Lease Guaranty. We remand this case to the Trial Court for a determination of the amount of reasonable attorney's fees and costs to be awarded Landlord on appeal.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for a determination of reasonable attorney's fees and costs on appeal to be awarded to Landlord, and for collection of the costs below. The costs on appeal are assessed against the Appellants, Ashleigh Martin and R. Martin Enterprises, Inc., and their surety.

_____
D. MICHAEL SWINEY, JUDGE